

Ethical Guidance for a Grand Jury

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INTRODUCTION

Students and scholars of law, as well as practitioners, have expressed differing views concerning the federal and state grand jury, its procedures, ethical rules, and even its very existence. Some have called for the grand jury's abolition,¹ others have argued for its reform in light of the realities of the criminal justice system,² and still others have advocated for measures that would restore the grand jury to its "historical" function as an independent, accusatory body representing the concerns of members of its surrounding community.³

Variability both in exculpatory evidence and grand jury secrecy practices in different states reflects ambiguity in the ethical rules and highlights the transformed role of the grand jury system. A significant cost of this transformed role, however, is a sense of alienation and confusion among grand jurors, many of whom feel uncertain about their responsibilities during grand jury service. Changes in the grand jury's role prompted by increases in plea bargaining, for instance, do not figure into grand jury training, leaving grand jurors to operate under the mistaken impression that every one of the defendants they vote to indict will face trial.⁴

There is consensus among grand jurors as well as prosecutors and scholars who have worked with them, that the inadequacy of grand juror training is more than a speculative concern.⁵ To date, the ethical rules have not addressed the

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1. See, e.g., Kevin K. Washburn, *Restoring the Grand Jury*, 76 *FORDHAM L. REV.* 2333, 2354 (2008) (citing scholarship supporting the abolition of the grand jury).

2. See, e.g., ROGER A. FAIRFAX, JR., *GRAND JURY 2.0* (2010) [hereinafter *GRAND JURY 2.0*]; Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 *J. CRIM. L. & CRIMINOLOGY* 1171, 1202 (2007–2008).

3. See Washburn, *supra* note 1, at 3 (noting that the historical balance of grand jury power should be restored in favor of jurors rather than the prosecutor). See generally *United States v. Williams*, 504 U.S. 36, 45 (1992).

4. See, e.g., Telephone Interview with State Grand Juror, Recent Coll. Graduate (Aug. 5, 2009) (noting a grand juror she served with would frequently say, on the assumption that every case would go to trial, "That's for the jury to decide; let's not worry about that right now"); Telephone Interview with State Grand Juror, Practicing Attorney (Aug. 11, 2009) (recalling, "We heard a hundred drug cases and we sent every single one of them to trial").

5. See *infra* note 109.

dilemma posed by jurors' systematic misunderstanding of their roles and responsibilities in light of the rapid changes experienced by the grand jury system.

Section I of this Note explores the extent to which the American Bar Association (ABA) Practice Guide, and similar major ethical conventions and advisory opinions, present competing interpretations of the grand jury's role in the criminal justice system. The lack of prosecutorial disclosure of exculpatory evidence, grand jury secrecy, and the abundance of plea negotiations demonstrate how historicized visions of the grand jury are appropriated to serve distinct conceptions of the institution's proper role. Section II offers a historical narrative of the grand jury that places grand jurors' "local knowledge" and experience at the heart of an inherently interpretive and evaluative enterprise. Section III addresses recent proposals for grand jury reform that create a more juror-centered and autonomy-emphasizing vision of the grand jury system. Drawing on interviews with grand jurors, prosecutors, and legal scholars who have experience with state and federal grand juries, Section IV highlights an aspect of grand jury process that is deserving of closer study: the absence of adequate training for grand jurors.

In light of grand jurors' concerns about their ill-defined responsibilities in the shifting institution of the grand jury, this Note concludes in Section V with a proposal that *judicial* (rather than prosecutorial) oversight play a more active role in rendering the grand jury intelligible to its jurors.

I. HISTORICIZED JUSTIFICATIONS FOR THE TRANSFORMED GRAND JURY

One impediment to honest discourse on grand jury procedure (and the prospect of improving it) is the risk that under the pretense of faithfully conforming to "historical" practice, the grand jury will not be able to adjust to the demands posed by national security concerns and the increased incidence of plea negotiation to resolve disputes.⁶ Debate surrounding a prosecutor's obligation to disclose exculpatory evidence highlights a key tension that figures into these debates: was the historical grand jury more or less autonomous than the one in existence now? And how do issues of prosecutorial and judicial oversight enhance or undermine this autonomy? As will be shown here, narratives of grand jury history are frequently deployed to advance legal scholars' conceptions of how grand jury procedure ought to be modified.

Irrespective of one's critical lens, however, there is consensus that the role of the grand jury is experiencing a process of rapid and accelerating change.

6. See, e.g., MARY VOGEL, COERCION TO COMPROMISE: PLEA BARGAINING, THE COURTS AND THE MAKING OF POLITICAL AUTHORITY 94-95 (2007).

A. PROSECUTORIAL DISCRETION WITH RESPECT TO EXCULPATORY EVIDENCE

The ABA's Ethics Practice Guide presents two dramatically different approaches to the appropriate exercise of prosecutorial discretion with respect to exculpatory evidence. The contradiction embodied in the ABA's ethics practice guide will serve as a point of departure for a broader theoretical examination of arguments that have dominated discussions of grand jury reform. On the one hand, prosecutors are required to disclose "substantial evidence" to grand jurors and cannot "knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense."⁷ The requirement that prosecutors disclose exculpatory evidence is also found in the *Model Rules of Professional Conduct*,⁸ which apply to prosecutors' dealings with grand juries, as well as the ABA *Standards for Criminal Justice*,⁹ and the U.S. Supreme Court's 1963 holding in *Brady v. Maryland*.¹⁰

On the other hand, in a passage that follows immediately after the ABA's Ethics Practice Guide's recommendation, conflicting Supreme Court precedent is cited with respect to the prosecutor's duty to disclose exculpatory evidence "in his function as advisor to a grand jury."¹¹ The guideline continues:

[I]n *U.S. v. Williams*, 504 U.S. 36 (1992), the Supreme Court held that there is no federal constitutional requirement that a prosecutor present even substantial exculpatory evidence to a grand jury. The court reasoned that requiring prosecutors to present exculpatory evidence to a grand jury would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body.¹²

7. LAWYER'S MANUAL ON PROFESSIONAL CONDUCT: PRACTICE GUIDE § 61:613; ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 3-3.6 [hereinafter ABA STANDARDS]; 7 DOJ MANUAL § 9-11.233 (Supp. 1992); NATIONAL PROSECUTION STANDARDS 58.4 (2d ed. 1991).

8. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2010) [hereinafter MODEL RULES] (discussing "Special Responsibilities of a Prosecutor," amended in February 1990 to note: "[T]he prosecutor in a criminal case shall . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . .").

9. See ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3-3.11 ("(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused."); see also ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3-3.6 ("(b) No prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense.").

10. See generally *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that a prosecutor was required to disclose evidence that an accomplice confessed to the homicide the defendant was being tried for).

11. See Donald J. Rose, *Prosecutorial Misconduct*, 6 GEO. J. LEGAL ETHICS 1067 (1993).

12. See *United States v. Williams*, 504 U.S. 36 (1992). Under *Williams* prosecutors are not required to present exculpatory evidence even in cases where such evidence is "substantial." See generally *Charlton v. Kelly*, 229 U.S. 447 (1913); John Bourdeaux, Jr., Glenda K. Harad & Alan Weinstein, *Duty to Present or Obtain Evidence Favorable to Accused*, 38A C.J.S. Grand Juries § 198 (2010).

Unlike the ABA Practice Guide's requirement that "substantial" exculpatory evidence be disclosed to grand jurors, the *Williams* decision held that a prosecutor did not even have an obligation to present "substantial" exculpatory evidence to a grand jury, asserting that "lower courts lack sufficient supervisory authority over grand juries to prescribe standards of prosecutorial conduct" independent of those already required by the Supreme Court.¹³

Of particular interest in the *Williams* opinion is Justice Scalia's characterization of a grand jury with judicial oversight of prosecutorial discretion as antithetical to its proper "historical role."¹⁴ Though critiqued as unsound based on the requirement of the grand jury to serve under the authority of the court that convenes it,¹⁵ Justice Scalia's assertion reflects a historicized mode of inquiry that will be revisited in Section III.

In a 2009 ethics opinion, the ABA acknowledged the apparent incongruity between a prosecutor's constitutional obligations and the requirements of state and local ethics guidelines. "Despite the importance of prosecutors fully understanding the extent of the separate obligations imposed by Rule 3.8(d)," the opinion stated, "few judicial opinions, or state or local ethics opinions, provide guidance in interpreting the various state analogs to the rule."¹⁶ Rather than incorporate the constitutional ethical standard advanced in *Brady*, Rule 3.8(d) creates an "independent" standard more rigorous than the constitutional one.¹⁷

Ambiguity in the federal ethical rules with respect to prosecutorial discretion results in a division among state grand juries: those that follow Scalia's *Williams* characterization, and those that impose an obligation on prosecutors to disclose certain forms of exculpatory evidence. An informal survey of twenty-three states using grand juries reveals that while a majority permit prosecutors to withhold exculpatory evidence from grand jurors, nine states (Alaska, Arizona, California, Massachusetts, North Dakota, New Jersey, New York, Oklahoma, and Utah) require that such information be presented to jurors.

In addition to the resulting inconsistent practices among different jurisdictions, one can also query the extent to which ambiguity in the ethical guidelines equips grand jurors to *understand* their evidentiary entitlements in the grand jury room. Do states that permit grand jurors to request presentations of exculpatory

13. See ABA STANDARDS, *supra* note 7, at 1087.

14. PAUL S. DIAMOND, 1-9 FEDERAL GRAND JURY PRACTICE AND PROCEDURE § 9.01 (4th ed. 2001).

15. *Id.* ("Justice Scalia's reading of grand jury history is simply wrong. It has long been the law that 'a grand jury has no existence aside from the court which calls it into existence and upon which it is attending.' It is the court alone that has the authority to convene a grand jury, whether 'regular' or 'special.'" (citing *O'Bryan v. Chandler*, 249 F. Supp. 51, 55 (N.D. Okla. 1964), *aff'd*, 352 F.2d 987 (10th Cir. 1965), *cert. denied*, 384 U.S. 926); see FED. R. CRIM. P. 6(a); see also 18 U.S.C.A. § 1331 (West 2011)).

16. ABA Formal Op. 09-454, 1 (2009). The opinion also points out that the scope of ethics rules are rarely addressed by courts in criminal litigation and that "disciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d)." *Id.*

17. *Id.* at 4.

States with No (or Limited) Requirement to Disclose Exculpatory Evidence ¹⁸	States that Give Grand Jurors Discretion to Hear Some Exculpatory Evidence ¹⁹	States that Require Prosecutors to Disclose Exculpatory Evidence ²⁰
Delaware	Arkansas	Alaska
Illinois	Kentucky	Arizona
Indiana	Nevada	California
Maryland	Oregon	Massachusetts
Minnesota	South Dakota	North Dakota
New Hampshire		New Jersey
Ohio		New York
Rhode Island		Oklahoma
Texas		Utah

evidence, for instance, provide jurors with the training necessary to understand what this entails?²¹ After all, the ability to request that prosecutors provide evidence that might *weaken* their case is of little use to grand jurors who are unaware of the extent of their discretion or how to exercise it.²²

B. CHANGES IN GRAND JURY SECRECY PRACTICES IN LIGHT OF NATIONAL SECURITY CONCERNS

Much like discussions of prosecutorial discretion, scholarly writing on the disclosure of grand jury proceedings frequently begins with reference to the

18. *People v. Beu*, 644 N.E.2d 27, 30 (Ill. App. Ct. 1994); *Wurster v. State*, 708 N.E.2d 587, 591 (Ind. Ct. App. 1999); *State v. Deleon*, 795 A.2d 776, 788 (Md. 2002); *State v. Oikon*, 299 N.W.2d 89, 109 (Minn. 1980); *State v. Hall*, 877 A.2d 222 (N.H. 2005).

19. *See, e.g.*, ARK. CODE ANN. § 16-85-511 (2005); ARK. CODE ANN. § 19-1106 (2005); NEV. REV. STAT. § 172.145 (2005); KY. R. CRIM. P. 5.08 (2005); *Guy v. Kentucky*, No. 2002-SC-000412-MR, 2004 WL 102512, at *4 (Ky. Jan. 2, 2004).

20. *See, e.g.*, *Camerson v. State*, 171 P.3d 1154, 1156 (Alaska 2007); *State v. Delacadena*, No. 1 CA-CR-08-0059, 2010 WL 25041, at *5 (Ariz. Ct. App. Jan. 5, 2010) (holding a prosecutor is only required to disclose evidence to grand jury that is “clearly exculpatory”); *Berardi v. Superior Court*, 57 Cal. Rptr. 3d 170 (4th Dist. 2007); Cal. Penal Code §939.71 (2005); *Com. v. Blaslucci*, 806 N.E.2d 104, 107 (Mass. App. Ct. 2004); N.D. Cent. Code §29-10.1-27 (2005); *State v. Demko*, 2010 WL 668766, at *1 (N.J. Super. Ct. App. Div. Feb. 26, 2010); *People v. Rodriguez*, 9 Misc.3d 1127(A), 2005 WL 3001547, at *1 (N.Y. Sup. Ct. 2005) (noting that New York has always required prosecutors to disclose all exculpatory evidence); 22 Ok. Stat. Ann. §335 (2005); *Strehl v. District Court of Salt Lake County*, 558 P.2d 597 (Utah 1976); Utah Code Ann. §77-10a-13(5) (2005).

21. Telephone Interview with Susan Brenner, Assoc. Dean and Professor of Law, Univ. of Dayton Sch. of Law (Jan. 21, 2011).

22. *Id.*

“longstanding tradition” of grand jury secrecy.²³ In the years following September 11, 2001, however, secrecy rules have been adjusted so that the federal government now employs the grand jury as a powerful instrument for combating terrorism. The USA PATRIOT Act, for example, changed Rule 6(e) of the *Federal Rules of Criminal Procedure* to allow the grand jury to disclose information involving “foreign intelligence or counterintelligence . . . or foreign intelligence information . . . to any Federal law enforcement, intelligence, protective immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.”²⁴ A significant consequence of this change was the removal of procedures that once required prosecutors to give notice to courts about information they disclosed, and imposed limits on the *uses* of such information by prosecutors.²⁵ Indeed, the language of the Act itself, including the phrase “foreign intelligence information” has raised concern among legal scholars that no meaningful restrictions have been placed on the nature of the information encompassed by such a broad definition.²⁶

Of greater concern to legal scholars, including Professor Lori Shaw, is the extent to which the Patriot Act provisions appear to undermine a tradition of grand jury secrecy that has been “revered and protected for centuries.”²⁷ She writes:

The Patriot [Act] intelligence exception creates a material breach of the protection afforded grand jury secrecy by the Fifth Amendment. The failure to require a showing of particularized need and the failure to require judicial supervision create a situation in which enormous numbers of disclosures can, have, and will be made. The cumulative effect of these disclosures will be to chill the participation of grand jury witnesses, and thereby cause systemic injury to the grand jury process.²⁸

With the intention of aggressively combating terrorist threats to the United States, information with little relation to “national security” objectives can now be

23. See generally Elizabeth G. Serio, Note, *Dangerous Precedent: The Consequences of Allowing Prosecutorial Disregard of Grand Jury Secrecy*, 21 GEO. J. LEGAL ETHICS 1011, 1011 (2008); see also FED. R. CRIM. P. 6(d)(1) (stating that only jurors, government attorneys, testifying witnesses, court reporters, and stenographers can be present during grand jury proceedings); FED. R. CRIM. P. 6(e)(2)(B) (imposing a secrecy requirement on all who are present during grand jury proceedings).

24. See Sarah Sun Beale & James E. Felman, *Enlisting and Deploying Federal Grand Juries in the War on Terrorism*, in GRAND JURY 2.0, *supra* note 2, at 8 (citing Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001)).

25. *Id.* at 8.

26. *Id.* at 9; see also Lori E. Shaw, *The USA PATRIOT Act of 2001, The Intelligence Reform and Terrorism Prevention Act of 2004, and the False Dichotomy Between Protecting National Security and Preserving Grand Jury Secrecy*, 35 SETON HALL L. REV. 495, 511 (2005).

27. See Shaw, *supra* note 26, at 531.

28. *Id.* at 550-51.

disclosed without judicial supervision, thus expanding the “intelligence” gathering and sharing capacity of the grand jury.²⁹

Others, however, approach the issue of grand jury secrecy as one of the greatest impediments to its perceived fairness and legitimacy. Calling for the reform of the grand jury, many scholars argue that transparency in criminal proceedings results in a more widespread perception of justice that accompanies greater opportunity for public scrutiny.³⁰ Though grand juries “may depend on secrecy to operate effectively,” John Gibeaut writes, “that same secrecy also means few Americans—lawyers included—really know what happens behind the closed doors.”³¹

Less common topics of reflection are grand jurors’ experiences with and attitudes toward issues of grand jury secrecy. Though grand jurors are told not to share details of cases or deliberation outside their chambers, instruction on other aspects of grand juror conduct may be absent altogether. What would happen, for example, if a grand juror decided to take out her laptop during deliberation to do some research of her own? What if a grand juror used a Blackberry or iPad to research how other jurisdictions dealt with prosecution of the same defendant?³² For trial jurors, the use of technology to conduct outside research is improper; as an impartial body, trial jurors are limited to consideration of the evidence that is presented to them.³³ As an *investigative* body imbued with the subpoena power to compel witnesses to testify before them, however, the issue of whether grand jurors understand the limits of their collection and exchange of research materials is currently unresolved.³⁴ In addition to having limited understanding of exculpatory evidence and grand jury secrecy requirements, many jurors have an inaccurate (and uncorrected) impression of the frequency with which indictments lead to trials.³⁵

29. *Id.* at 551-52.

30. See, e.g., Ric Simmons, *The True Goals of the Modern Grand Jury—and How to Achieve Them*, in GRAND JURY 2.0, *supra* note 2, at 244 (citing *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 571-72 (1980) (“The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is ‘done in a corner [or] in any covert manner.’”)).

31. See generally John Gibeaut, *Indictment of a System*, A.B.A. J., Jan. 2001, at 34, 36 (2001).

32. See Brenner interview, *supra* note 21.

33. See Susan Brenner, *Grand Jurors, Technology and Juror Misconduct*, CYB3RCRIM3 (Jan. 1, 2010, 9:01 AM), <http://cyb3rcrim3.blogspot.com/2010/01/grand-jurors-technology-and-juror.html> (quoting *Pratt v. St. Christopher’s Hospital*, 866 A.2d 313, 544 (Pa. 2005)) (“When jurors conduct their own experiments . . . , the result is the introduction of facts that have not been subject to the rules of evidence or to cross-examination by either party.”).

34. *Id.*

35. Interestingly, when thirty-four judicial and United States Attorney’s Office interns were given an anonymous survey that asked, “What percentage of people charged with a federal crime go to trial,” only two guessed a figure lower than 5 percent. Intern surveys (June 25, 2010) (on file with author).

C. THE EFFECT OF THE INCREASING INCIDENCE OF PLEA BARGAINING ON THE ROLE OF FEDERAL AND STATE GRAND JURIES

Plea bargaining is another phenomenon that is arguably in tension with the grand jury's "historical" role as an investigative rather than adjudicative body. Despite extensive media attention to litigation, full jury trials are the exception rather than the rule. Between 90 and 95 percent of all convictions in the United States are plea-bargained before ever reaching a trial.³⁶ In 2009, for instance, out of the 81,370 criminal cases brought to federal district courts, 96.3 percent were resolved by guilty pleas with a mere 3.7 percent going to trial.³⁷ Federal prosecutors have suggested that even the 96 percent figure may be misleading since "plea offer and some plea negotiation . . . is also part of just about every federal case that goes to trial."³⁸

Many critics of plea bargaining focus on defendants' perverse incentives to plead guilty to crimes they did not commit,³⁹ as well as the discretion afforded to prosecutors to strategically induce guilty pleas by bringing excessive or ill-founded charges.⁴⁰ Several studies and a recent documentary series depict inmates who have maintained their innocence for at least one (if not all) of the charges brought against them but proceeded to enter guilty pleas at the urging of their defense attorneys.⁴¹ A recent analysis of federal criminal cases suggests that

36. See Vogel, *supra* note 6, at 3.

37. U.S. SENTENCING COMMISSION, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 11, available at <http://ftp.uscc.gov/ANNRPT/2009/Table11.pdf>, May 28, 2010 (last visited Mar. 29, 2011) ("[T]he rate of plea negotiation in U.S. district courts increased in 2009 from 95.8 percent in 2007 and 2008 and 94.5 percent in 2005.").

38. See Mary P. Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1064 (2006) (noting that plea bargaining is "a defining, if not the defining, feature of the present federal criminal justice system").

39. See, e.g., Jack Kamerman, *The Social Construction of Responsibility*, in NEGOTIATING RESPONSIBILITY IN THE CRIMINAL JUSTICE SYSTEM 4 (Jack Kamerman ed., 1998) (noting that plea bargaining can result in the conviction of the innocent for whom "pleading guilty to a lesser charge [is] preferable to being steamrolled into conviction on a more serious charge").

40. See, e.g., *id.* at 156; G.M. Sykes, *Cases, Courts, and Congestion*, in LAW IN CULTURE AND SOCIETY 331 (Laura Nader ed., 1969) (A number of legal scholars and social scientists underscore the problems of the "deal-making atmosphere" of plea bargaining by which offenders plead guilty in return for a reduction in the "seriousness of the charge" or the "length of the recommended sentence"); Andrew D. Leipold, *Prosecutorial Charging Practices and Grand Jury Screening: Some Empirical Observations*, in GRAND JURY 2.0, *supra* note 2, at 207 (arguing that prosecutors introduce excessive secondary charges as bargaining chips to induce pleas from defendants who might not necessarily be proven guilty at trial); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717 (2006) ("[T]he overbreadth of criminal statutes . . . makes it possible to charge one course of conduct under a multiplicity of overlapping legal descriptions. One effect of this overbreadth is that prosecutors may exploit the discretion to choose among overlapping charges by manipulating post-trial charges (i.e. overcharging the case to set post-trial sentences higher . . .)").

41. See, e.g., *The Plea*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/plea> (last visited Mar. 29, 2011) (describing the case of thirty-year-old single mother Erma Stewart of Hearne, Texas, who pled guilty to a narcotics charge she was not responsible for, due to poor legal advice from defense counsel and coercion by the prosecutor. The confidential informant who provided evidence for the charges brought against

“the widespread use of multiplicitous charges” may account for the fact that rates of dismissal increase as the “seriousness” of the charges brought against a defendant decrease.⁴² Aside from the potential for abuse, however, the prevalence of plea bargaining transforms the grand jury’s role in the criminal justice system. Some legal scholars and anthropologists caution that under the guise of enhancing judicial efficiency, plea bargaining represents a form of “uncluttered” justice that fails to ensure that evidence is evaluated as meticulously as in trials.⁴³

With similarity to the issue of jury secrecy, the effect plea bargaining has on the percentage of cases that go to trial is often criticized as undermining the legitimacy of the criminal system more broadly.⁴⁴ Kevin Washburn writes:

Plea bargaining inhibits transparency, ensuring that criminal justice is run behind closed doors by insiders (judges, prosecutors, defense attorneys, and law enforcement officials) and to the exclusion of outsiders (ordinary citizens and victims) who are left ill-informed about criminal justice. As a result criminal law is deprived of the legitimacy that juries comprised of ordinary citizens provide.⁴⁵

Indeed, the dramatically reduced presence of petit juries means that the “most important decision point in a criminal case,” the “decision whether and what to charge,” rests with the grand jury.⁴⁶ The grand jury thus becomes a *de facto* trier of fact.

As a result of plea bargaining, the grand jury is now “likely to be the ‘final step’ in a criminal proceeding and the ‘sole occasion’ for public scrutiny.”⁴⁷ The secrecy of grand jury proceedings and high incidence of plea bargaining thus result in “fewer instances where the prosecutor actually has to prove her facts” and an increased likelihood that a trial court will “remedy errors left uncorrected.”⁴⁸ Since the Federal Rules of Criminal Procedure define plea bargains as

her was later proven to be unreliable and the case was dismissed after Erma served ten years of her prison sentence.).

42. See Leipold, *supra* note 40, at 207, 214.

43. See Ross, *supra* note 40, at 717 (“A number of structural features of the U.S. legal system facilitate the use of plea bargains as short-cuts to criminal convictions First . . . the adversarial nature of the U.S. criminal process . . . validates convictions as the outcome of a contest between parties rather than a search for truth Second, the absence of a principle of compulsory prosecution . . . gives prosecutors convenient leeway in selecting charges.”); CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 172 (1983) (“[T]he expansion of plea-bargaining in criminal cases, which avoids undue exertion in organizing evidence for all concerned and brings the factual side of things to court largely stipulated.”).

44. See generally Washburn, *supra* note 1 (arguing “the prevalence of plea bargaining has decimated trials and robbed citizens of opportunities”).

45. *Id.* at 259.

46. See, e.g., Adriaan Lanni, *Implementing the Neighborhood Grand Jury*, in *GRAND JURY 2.0*, *supra* note 2, at 259.

47. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 26 (Stevens, J., dissenting).

48. Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury’s Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1207 (2007–2008) (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 264–65

“voluntary” under circumstances where they are not the result of “force,” “threats” or “extraneous promises,” prosecutors’ failure to disclose exculpatory evidence is not viewed as detracting from the “voluntariness of a defendant’s decision to plead guilty.”⁴⁹

When interviewed, a number of state grand jurors recalled being unaware of the phenomenon of plea bargaining, viewing grand jury indictments as a small step in an extended process. The perceived lack of finality of indictments contributed to a widely held sense that they were not “making decisions affecting someone’s life” directly.⁵⁰ Another grand juror reiterated this sentiment, commenting that grand jurors felt they were “rubber stamps,” noting:

[T]he system will take it from there and justice will be done. I don’t think there’s an understanding of the implications within judicial process that an indictment is an indictment that has repercussions on someone’s future life and that you do have an important role to make sure people aren’t accused unfairly.⁵¹

This mindset, the juror added, activated a process of “deferring responsibility” by which grand jurors relied on “cops, the court, a judge, or the next jury” rather than consider the likelihood that they would be the final eyes on a defendant’s case.⁵²

As Section IV discusses, the existence of plea bargains contributes to a broader feeling among some grand jurors that their comprehension of their responsibilities as jurors is incomplete at best and based on inaccurate and uncorrected assumptions at worst.

Before examining the proposals seeking to remedy jurors’ informational deficits, it is instructive to acknowledge aspects of grand jury history that emphasize its institutional autonomy and community-based legitimacy.

II. A HISTORICIZED VIEW OF THE GRAND JURY THAT EMPOWERS THE JUROR

Literature on grand jury process and reform frequently starts with a narration of the institution’s “historical roots” and “antecedents.”⁵³ While there appears to

(1988) (Marshall, J., dissenting) (“Because of the strict protection of the secrecy of grand jury proceedings, instances of prosecutorial misconduct rarely come to light.”).

49. See Ross, *supra* note 40, at 719-20; United States v. Ruiz, 536 U.S. 622, 630 (2002) (“[T]his Court has found that the Constitution, in respect to a defendant’s awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor.”); FED. R. CRIM. P. 11(d).

50. See Interview, *supra* note 4.

51. Telephone Interview with State Grand Juror, Social Worker with Law Degree (Aug. 11, 2009). Another interviewee who works as a high school English teacher noted that the experience of being a grand juror felt like playing the role of a “rubber stamp.” Telephone Interview with State Grand Juror, High School English Teacher (Aug. 11, 2009).

52. See, e.g., *id.*

53. See, e.g., LEROY D. CLARK, THE GRAND JURY 7 (1975) (“What are the historical roots of the grand jury, an institution commanding only hallowed judicial comments? Has it warranted its long-standing reputation as a

be consensus that one of the first incarnations of the contemporary grand jury emerged around 1159 under the auspices of King Henry II,⁵⁴ historians' emphasis on periods of grand jury history has differed depending on their aspirations for the institution's future role. In the *Williams* opinion, for example, the majority and dissenting opinions substantiate conceptions of the grand jury's relationship to the judiciary based on distinct appropriations of a complex and conflicting historical record.⁵⁵ Similarly, references to grand jury secrecy in the ethical rules draw on a tradition of not disclosing grand jury proceedings to others, including attorneys dealing with related matters.⁵⁶ Despite variation in the retelling, a common thread in historical discussions of the grand jury is the institution's role as "voice of the community."⁵⁷

The conception of grand jurors as producers of localized knowledge about accused individuals is discernable from a survey of historical materials. Even in the 12th century, the "evidence" considered by jurors represented an effort to accumulate anecdotal information about a defendant's reputation and character; local knowledge of the *fama* or public fame/rumor remained the "workable juristic requirement" for charging individuals with crimes through the fourteenth century.⁵⁸ Grand jurors simultaneously assumed the role of judges and witnesses as they drew on personal impressions of "local reputation, local custom . . . and personal statuses" to assess the validity of an accusation.⁵⁹

Jurors' social and geographic proximity to the accused during the grand jury's early, English incarnation thus rendered them comparable to participant observ-

democratizing and protective agent? Or are there historical antecedents for the current use of the institution as a political weapon?").

54. FREDERICK POLLOCK & F.W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 123 (London, C.J. Clay and Sons, 1905); J.P. DAWSON, *A HISTORY OF LAY JUDGES* 118 (1960); JOHN HOSTETTLER, *THE CRIMINAL JURY OLD AND NEW: JURY POWER FROM EARLY TIMES TO THE PRESENT DAY* 18 (2004) [hereinafter *CRIMINAL JURY*].

55. In *United States v. Williams*, Justice Scalia notes that the grand jury's separation from the judicial branch is "rooted in long centuries of Anglo-American history," adding that that its "institutional relationship with the Judicial Branch has traditionally been . . . at arm's length." 504 U.S. 36, 47 (1992). The dissent, meanwhile, invoked the history of the grand jury to support the proposition that the grand jury has a tradition of protecting citizens "against arbitrary and oppressive government action." *Id.* at 68 (citing *United States v. Calandra*, 414 U.S. 338, 342 (1974)).

56. See ABA/BNA Lawyer's Manual on Professional Conduct, Current Reports Disciplinary Proceedings, 2 (Dec. 2004); ABA-CJC Terminology, 2 (Aug. 2010) ("'Nonpublic information' means information that is not available to the public . . . [including] information offered in grand jury proceedings . . ."); see also ABA STANDARDS FOR CRIMINAL JUSTICE Standard 8-3.2 (3d ed. 1992) ("Certain proceedings and documents are 'otherwise required to remain confidential' and therefore exempted from the general rule of access. Typical among these are grand jury proceedings . . .").

57. See Roger A. Fairfax, *Remaking the Grand Jury*, in *GRAND JURY 2.0*, *supra* note 2, at 331 (citing Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67 (1995)).

58. See R.H. Helms, *The Early History of the Grand Jury and the Canon Law*, 50 U. CHICAGO L. REV. 620 (1983); Mike Macnair, *Vicinage and the Antecedents of the Jury*, 17 L. & HISTORY REV. 574 (1999).

59. Macnair, *supra* note 58, at 555, 589; JOHN HOSTETTLER, *CRIMINAL JUSTICE IN ENGLAND AND WALES* 143 (2009).

ers or “informants” who served as an invaluable link between the king’s judges and their surrounding territories.⁶⁰ Rather than subject the accused to a trial by ordeal immediately, the discretion that lay jurors exercised enabled them to give expression to the values and attitudes of their community on the basis of “what was reputed in the neighborhood” as well their “prior perceptions” and subsequent judgment of the locality.⁶¹ Georges Lamoine noted that the behavior valuations inherent in accusations based on rumor made members of the jury “guardians of public morality,” citing descriptions of jurors as “the only Censors of this Nation” and “Correctors of Manners.”⁶² For instance, it was not uncommon for grand jurors to accuse individuals of behavior ranging from public swearing and drunkenness to spending late-night hours in an ale-house, frequenting a “bawdy house,” or gaming.⁶³ Like today’s tabloid journalists and bloggers, grand jurors became the self-legitimated and publicly exalted gossipers of their time, maintaining and reinforcing public perceptions of the line between acceptable and transgressive social behavior.⁶⁴

Despite continued (and ironic) allusions to grand jury “history,” the grand jury system was abolished in England in 1933, while remaining part of the United States’ federal and state systems today.⁶⁵ One of the risks of historicized justifications for current and proposed reforms for grand jury procedure is the risk that purportedly “objective” narrations of the grand jury’s origin will prevent honest discussion about favorable changes that should take place.⁶⁶ While the *Williams* holding, with respect to prosecutors’ disclosure of exculpatory evidence, represents a view of the grand jury as having a “prosecutorial” model, this conclusion is neither historically accurate nor analytically inevitable. Its depic-

60. A. Albert Lieck, *Abolition of the Grand Jury in England*, 25 J. CRIM. L. & CRIMINOLOGY 623, 623 (1934).

61. See, e.g., CRIMINAL JURY, *supra* note 54, at 16, 18 (2004).

62. See, e.g., CHARGES TO THE GRAND JURY 1689-1803 13 (Georges Lamoine ed., 1992).

63. See, e.g., *id.* at 12.

64. See, e.g., *id.* at 13.

65. See U.S. CONST. amend. V (“No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury”); see Susan Brenner & Lori Shaw, *Power to Abolish the Grand Jury*, UNIV. OF DAYTON SCH. OF LAW, <http://campus.udayton.edu/grandjur/statelj/abolish.htm> (last visited Mar. 29, 2011) (noting that twenty-three states including the District of Columbia still require the use of grand juries to charge particular crimes. These states include Alabama, Alaska, Delaware, Florida, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and West Virginia); Hoffmeister, *supra* note 3, at 1174-75 (noting that a majority of states allow prosecutors to use grand juries, and that the Fifth Amendment requires felony charges to be accompanied by a grand jury’s indictment unless this right is waived by the defendant for a non-capital offense).

66. See Niki Kuckes, *Retelling Grand Jury History*, in GRAND JURY 2.0, *supra* note 8, 150 (2010) (“Using history as a justification . . . has two basic harms . . . [I]t masks the Court’s true rationale and limits a fuller debate of the reasons for preferring one model or another. This process should be done consciously, rather than under the guise of a supposedly uniform historic ‘tradition.’ . . . Second . . . the Supreme Court’s particular articulation of grand jury history, in which the lower courts are now largely barred from regulating grand jury procedures, is a premise that affirmatively blocks the courts’ development of more meaningful and workable rules and threatens to freeze grand jury rules in place.”).

tion as such, however, precludes meaningful debate about configurations of the grand jury that might enable it to operate more effectively.⁶⁷ Thus, the *Williams* holding that “courts should be largely barred from prescribing grand jury rules”—in addition to “reflecting a conceptual choice” with a tenuous historical basis—“threatens to freeze grand jury procedures in their current mold.”⁶⁸

III. PROPOSALS FOR GRAND JURY REFORM WITH AN EMPHASIS ON JUROR (AND JURY) AUTONOMY

Drawing on the conception of the grand jury as a vehicle for community involvement, recent proposals for reform have focused on structural changes that would make the grand jury a more localized, independent body. The use of juries composed of “neighborhood residents” and the provision of independent counsel to serve as a buffer between jurors and prosecutors have been topics of continued discussion. In both cases, the contested narrations of the grand jury’s historical function as well as ethical concerns related to excessive prosecutorial discretion have guided debate.

A. NEIGHBORHOOD GRAND JURIES

Discourse related to the establishment of “neighborhood” grand juries emphasizes the extent to which community engagement with the criminal justice system can be enhanced, and the “historical” function of the grand jury can be “restored.”⁶⁹ Though the randomized selection of jurors is meant to create a “fair cross-section” of the community, critics of juror selection point out that jurisdictions do not embody communities, and that minority voices and perspectives can be lost when jurors are randomly pooled from segregated areas.⁷⁰ The connectedness of the grand jury and the local community, in Washburn’s view, would play a key part in the “restoration” of the grand jury’s constitutional purpose.⁷¹ Drawing on an interpretation of the grand jury as an “Anti-Federalist check on federal power”—one that contrasts with the prosecutorial model advanced in *Williams*—Washburn contends that the grand jury serves as a “barometer of legitimacy,” evaluating laws as they are applied to particular

67. *Id.* at 151-52 (“[F]ederal courts look at arcane details of ancient English practice—and in the process, render a history that is often selective, cursory and incomplete. The result is neither good history nor good constitutional interpretation.”).

68. *Id.* at 148, 153.

69. See Lanni, *supra* note 46, at 172.

70. See, e.g., Washburn, *supra* note 1, at 5.

71. See *id.* (“Reform proposals ought to be focused . . . on making the grand jury *less* independent of the people in the local community. Such a shift would not only align the grand jury more closely with its original constitutional purpose, and serve all communities better . . .”).

cases.⁷² To create "neighborhood grand juries," jurisdictions would rely on zip codes rather than district or "county-wide" jury pools:⁷³

In a society that is far more numerous and much more diverse, we ask too much from a grand jury that is culled from an entire county or judicial district. The representation is diluted to the point that the grand jury is effectively homogenized.⁷⁴

It is only when grand juries are constructed from a zip-code model, Washburn argues, that they can more closely reflect the voice of the community and honor their tradition of serving as a check on the illegitimate exercise of authority.

As part of Adriaan Lanni's proposal, truly "localized" grand juries would provide jurors with opportunities to generate policy recommendations and serve as "focus groups" that set "policing and prosecution priorities for the neighborhood."⁷⁵ In addition to reviewing individual plea bargains and helping "articulate some of the criteria that influence charging and bargaining policies," grand juries can issue recommendations about the severity or leniency of the punishments that accompany particular charges.⁷⁶ With increased jury participation in policymaking and decisions underlying criminal prosecutions, the hope is that criminal laws and sentences will more closely track the public opinion of individuals in the communities from which criminal charges are brought.⁷⁷

B. INDEPENDENT COUNSEL FOR GRAND JURORS AND JURY INVOLVEMENT WITH THE PLEA BARGAINING PROCESS

A number of scholars have proposed strengthening grand jurors' autonomy by advocating for a more widespread use of a "Grand Jury Legal Advisor" (GJLA).⁷⁸ The GJLA's primary responsibility would be to "provide grand jurors unbiased answers to their questions,"⁷⁹ though secondary rationales include the need for an "impartial" or "honest broker," to ensure that grand jury procedures

72. *Id.* at 6, 46 ("To restore this role, we need not change the way the grand jury works; we merely need to change the way the grand jury is constructed.").

73. *Id.* at 47 ("A grand jury that is more localized could replicate the kind of community that existed when the Bill of Rights came into being and could meet the constitutionally-intended purposes of the grand jury requirement much better . . .").

74. *Id.* at 48 ("The problem with a homogenized grand jury is that it fails to serve 'the same role as the grand jury at the time of the founding which represented a modest-sized community of similarly situated people.'").

75. See Lanni, *supra* note 46, at 175, 184.

76. *Id.* at 185. Lanni points out that the grand jury's advisory input could be helpful for "controversial" crimes, including those related to "quality of life," "statutory rape," or "non-violent drug offenses," where different policy priorities might cause sentences to differ widely.

77. *Id.* at 186.

78. See Hoffmeister, *supra* note 2, at 1177; Washburn, *supra* note 1, at 3 (citing Akhil Amar, *Reinventing Juries: Ten Suggestions*, 28 U.C. DAVIS L. REV. 1169, 1185 (1995)).

79. See Hoffmeister, *supra* note 2, at 1177 (noting that it is not the Grand Jury Legal Advisor's role to advocate on behalf of particular parties but rather to serve as a resource at the grand jurors' disposal).

operate fairly.⁸⁰ Without independent counsel for grand jurors, scholars warn, prosecutors “control every aspect of the process save for voting on the actual indictment” and can circumvent existing checks on the off-the-record opinions and advice prosecutors share with grand jurors.⁸¹ The GJLA is currently being utilized to great effect by the State of Hawaii and by the military.⁸²

In light of the relative scarcity of criminal trials, another proposal for jury reform calls for the integration of jurors in the plea bargaining process. In her article advocating for a “plea jury,” Laura Appleman argues that juror involvement in plea negotiation would facilitate greater community involvement in criminal procedure,⁸³ and effectuate the Sixth Amendment values that are otherwise lost in the absence of a trial.⁸⁴ Rather than keep plea negotiations relegated to an “unregulated” negotiation between a prosecutor and defense attorney, Appleman envisions a key role of the plea jury as listening to the defendant’s explanation of his offense to determine “whether the factual basis admitted by the defendant matched the original charged crimes, whether the plea was knowing, willing and voluntary, and whether the proffered sentence was appropriate.”⁸⁵ In the process of “restoring the community’s voice” to criminal proceedings, Appleman notes the importance of the “educative function” of jury work, as increased public “understanding” of criminal justice process is valuable in its own right.⁸⁶ Educating members of the community, she suggests, reinforces the values underlying retributive justice because it creates a greater likelihood that *defendants* will understand their charges as well.⁸⁷

Drawing on Appleman’s analysis, Professor Fairfax suggests that many advantages of the “plea jury” could be achieved by reinforcing community involvement in grand juries as they are currently configured.⁸⁸ Fairfax also notes

80. *Id.* at 1178.

81. *Id.* at 1184 (noting that this practice has caused some to question the necessity of the grand jury altogether in light of these obstacles to its “intended function of being the voice of the community”).

82. *Id.* at 1215 (citing HAW. CONST. art. I § 11) (The amendment, which was ratified in 1978, reads: “Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons licensed to practice law by the supreme court of the State and shall not be a public employee. The term and compensation for independent counsel shall be as provided by law.”).

83. Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 733 (2010) (noting that “the current configuration of the criminal guilty plea leave no room for the community’s voice”).

84. *Id.* at 741 (“With our heavy use of guilty pleas . . . it is important that substantive, theoretical values are integrated into the actual processes of the criminal system.”).

85. *Id.* at 749.

86. *Id.* at 758-59, 763 (suggesting that participation as “plea jurors” would allow members of the community to “better understand how the system adjudicates and punishes crime, which will provide . . . an educative function”). Appleman also notes the extent to which public involvement in plea negotiation encourages a “morality play” in which the public administration of justice gives expressive visibility and legitimacy to an aspect of criminal justice process that reinforces social and “legal norms.” *Id.* at 47.

87. *Id.* at 761.

88. Telephone Interview with Roger Fairfax, Professor of Law, George Wash. Univ. Law Sch. (Sept. 24, 2010); Fairfax, *supra* note 57, at 335.

that nothing in the Constitution prevents grand jurors from playing a greater role in policymaking and plea negotiation.⁸⁹

IV. JURORS' INFORMATIONAL DEFICIT AS AN IMPEDIMENT TO GRAND JURY LEGITIMACY

One of the grand jury's greatest limitations is the extent to which jurors are denied knowledge of their responsibilities as well as an accurate sense of their role in a larger criminal justice process. Despite the fact that the ability to make discretionary decisions is an institutionally significant part of the grand jury's delineated power, jurors are rarely provided with the information necessary to exercise this power in individual cases.⁹⁰ If the grand jury exercised its discretion, Fairfax suggests, citizen participation could be enhanced in a manner "the system sorely lacks in this age of ubiquitous guilty pleas."⁹¹ Indeed, grand jurors are too frequently given instructions warning of the limitations of their powers rather than their ability to exercise them.⁹²

Some of the most revealing expressions of frustration about the inadequacy of grand juror preparation and orientation come from jurors themselves. In rare cases, grand jurors have published personal accounts of their experiences, highlighting the daunting process by which they are transformed from randomly selected citizens with disrupted day jobs to jurors obligated to serve two days per week for over a year.⁹³

Professor Susan Brenner of the University of Dayton School of Law, who has spent the past decade operating an informal website on the federal grand jury, fields numerous questions from empanelled grand jurors who struggle to understand their obligations.⁹⁴ Citing several of these correspondences, Professor Brenner described a foreperson's confusion about federal grand jury procedure. The juror wrote in an email:

Many of my fellow jurors do not seem to clearly understand their responsibility as a grand juror and seem to be aligned with whatever the U.S. Attorneys present or want . . . I would like to take some time to educate or discuss with

89. See Fairfax, *supra* note 57, at 335.

90. See Roger A. Fairfax, *Does Grand Jury Discretion Have a Legitimate (and Useful Role to Play in Criminal Justice?)*, in GRAND JURY 2.0, *supra* note 2, at 80 ("Recognition of the grand jury's discretion may very well strengthen the grand jury as an institution, and a fortified grand jury may enhance the individual liberties it serves to protect.").

91. *Id.* at 80.

92. See Michael D. Hawkins, *Honoring the Voice of the Citizen: Breathing Life into the Grand Jury Requirement*, in GRAND JURY 2.0, *supra* note 2, at 117 (noting that grand jurors are routinely told, for instance, that they cannot consider the policies behind and the punishments that accompany particular crimes).

93. See, e.g., BLANCHE DAVIS BLANK, *THE NOT SO GRAND JURY* 1-4 (1993).

94. See Susan Brenner & Lori Shaw, *Federal Grand Jury*, UNIV. OF DAYTON SCH. OF LAW, <http://campus.udayton.edu/grandjur/index.htm> (last visited Mar. 29, 2011).

the grand jurors our responsibilities, as I am sure that most have forgotten them from the time they were initially given the grand jury charge.⁹⁵

Despite the foreperson's understanding that the jury was left alone during deliberation, she did not know whether it might be permissible to discuss the jury's "responsibilities" during a discrete period of time, and apart from the U.S. attorneys and court reporter.⁹⁶ Brenner found the email notable for its implication that providing structural opportunities for grand jurors to share knowledge might "advance the operational independence of the grand jury."⁹⁷

Interviews with individuals who served as *state* grand jurors reveal consensus that they frequently felt they lacked a basic understanding of their responsibilities with respect to the accused. One practicing attorney who served as a grand juror commented that he did not "remember . . . having any kind of orientation or instruction . . . I don't really have a recollection of being told what we were going to do beforehand."⁹⁸ He did note, however, "It was pretty clear in the minds of the grand jurors it wasn't our job to weigh the evidence."⁹⁹ A recent college graduate who served as a state grand juror echoed this impression, noting that few jurors "understood what [their] role was in the legal system."¹⁰⁰ She recalled:

I don't think they told us very much. I remember being confused, went home, and researched it on Wikipedia. They sort of said that guilt is determined at a later time and you're just deciding if there's enough evidence to go forward with the case which implicitly suggested that we should be voting yes with all the cases¹⁰¹

In light of the reported satisfaction felt by grand jurors who *are* engaged with their work and the sense of procedural justice implicit in enhanced juror participation,¹⁰² federal and state grand juries would be wise to invest greater attention to the process of training and acculturating jurors.¹⁰³ One solution, Fairfax suggests, could involve a change in the language of grand jury instructions:

An empanelling judge will typically charge the grand jurors that if they find *probable cause* in a case, they *should* indict. A simple shift to language

95. Susan W. Brenner, *Grand Jurors Speak*, in GRAND JURY 2.0, *supra* note 2, at 38-39.

96. *Id.*

97. *Id.* at 38.

98. Telephone Interview with State Grand Juror, Attorney (Aug. 6, 2009).

99. *Id.*

100. Telephone Interview with State Grand Juror, Recent Coll. Graduate, *supra* note 4.

101. *Id.*

102. See Simmons, *supra* note 30, at 243 ("[I]n order to obtain any benefits of the grand jury system, real reforms are needed. Grand juries must be engaged in their work; they must hear sufficiently detailed presentations from prosecutors . . .").

103. See Fairfax, *supra* note 57, at 82.

informing grand jurors that they *may* indict if they find probable cause would enhance the grand jury's discretionary role.¹⁰⁴

Fairfax notes that in addition to instructing grand jurors about their discretion to request further evidence in cases, they should be reminded of their "own investigative prerogative" and the clear limits on prosecutorial discretion.¹⁰⁵

Another approach to increasing jurors' understanding of their responsibilities might focus on ensuring the *foreperson* has access to materials defining aspects of grand jury procedure that might aid her in the day-to-day mechanics of facilitating jury deliberation and voting.¹⁰⁶ The Northern District of Illinois, for instance, offers a handbook specifically written for the foreperson, acknowledging the importance of attempting "to explain grand jury duty and its inherent responsibilities and duties in more general terms" to aid with "day to day aspects of managing a grand jury."¹⁰⁷ Implicit in Illinois' release of a specialized manual for the foreperson is a sense that jurors benefit from a non-prosecutor source of authority to clarify aspects of grand jury procedure not contained in other orientation materials. If a handbook for forepersons was available in more jurisdictions, information pertaining to exculpatory evidence and extent of grand jury discretion might aid a number of grand jurors.

V. PROPOSED ADDITION TO JUDICIAL ETHICAL RULES THAT WOULD ENCOURAGE SUSTAINED JUDICIAL OVERSIGHT OF GRAND JUROR EDUCATION

In light of the grand jury's procedural transformation since September 11, 2001, including variation in requirements related to the disclosure of exculpatory evidence and the presence of plea bargaining, it is critical to the grand jury's effectiveness that jurors understand the extent of their discretion and responsibilities. The expansion of jurors' familiarity with the "myriad rules and procedures governing the grand jury system" as well as the "expectations and legal requirements applicable to grand jurors" is already a prominent feature of recommendations for grand jury improvement;¹⁰⁸ when grand jurors were

104. *Id.*

105. *Id.*

106. See Brenner, *supra* note 21.

107. *Grand Jury Foreperson's Handbook*, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ILLINOIS, <http://www.ilnd.uscourts.gov/JURY/Grndjury.htm> (last visited Mar. 29, 2011) (noting that the Foreperson's Handbook would "not simply be a duplication of that contained in the 'Handbook for Grand Jurors'").

108. See, e.g., COUNCIL FOR COURT EXCELLENCE, DISTRICT OF COLUMBIA GRAND JURY STUDY COMMITTEE, *THE GRAND JURY OF TOMORROW: NEW LIFE FOR AN ARCHAIC INSTITUTION* (2001) [hereinafter COUNCIL FOR COURT EXCELLENCE] ("Currently, citizens summoned for grand jury service do not always appreciate the significant differences between grand and petit jury service. This can result in unnecessary anxiety and misunderstandings about the expectations and legal requirements applicable to grand jurors. User-friendly information will promote effective functioning of the grand jury and will make citizens more at ease as they perform their civic duty.").

interviewed in the District of Columbia, all of them recommended that “more information” be made available throughout the duration of their jury service:

They described remarks made by the Chief Judge or his designee on the first day of service as helpful and informative, but more limited than desirable and, because not presented in writing, quickly forgotten. They also described the initial orientation by the U.S. Attorney’s Office as instructive and helpful, but again unwritten and of limited usefulness. They saw an orientation movie but did not remember its contents.¹⁰⁹

Jurors also noted that to perform their duties “comfortably and effectively” they needed more time to review orientation materials before reporting for service.¹¹⁰

Recommendations for grand jury reform have specifically focused on the content of judicial instructions to members of the grand jury at the start of their service.¹¹¹ In its 2001 report, the Council for Court Excellence, for instance, noted that prosecutors’ presentation of exculpatory evidence was important to jurors’ understanding of the cases before them.¹¹² The proposed addition to the D.C. Superior Court’s grand jury charge would provide grand jurors access to “documents and other tangible evidence that might bear on either the guilt or the innocence of an accused.”¹¹³

As the divided opinion on the disclosure of exculpatory evidence suggests, however, greater judicial involvement with juror orientation could provide jurors a clearer understanding of their duties. While ethical debates surrounding the disclosure of exculpatory evidence are difficult to resolve, relatively simple adjustments could address concerns that current jury orientation procedures leave grand jurors unprepared and therefore less effective as a check on the just enforcement of criminal laws. Even if substantive changes are not made to grand jury orientation instructions, jurors might benefit from hearing instructions repeated to them more frequently, or presented in a different order so that they could better retain the information.¹¹⁴ Judges should instruct jurors on which resources they may properly consult as questions arise, and *who*—if not the prosecutor—might be available to address substantive or procedural questions.

109. *Id.*

110. *Id.* at 34.

111. *See, e.g.,* Fairfax, *supra* note 57, at 82 (“Of course, the most direct method [of informing grand jurors about their discretion] would involve informing the grand jurors . . . when they are empanelled and sworn at the beginning of their terms of service. An empanelling judge will typically charge the grand jurors that if they find *probable cause* in a case, they *should* indict. A simple shift to language informing grand jurors that they *may* indict if they find probable cause would enhance the grand jury’s discretionary role.”).

112. *See* COUNCIL FOR COURT EXCELLENCE, *supra* note 89, at 35-36 (“[W]e believe that the Grand Jury Charge, consistent with Bill S. 2289 introduced in the Second Session of the 105th Congress by Senator Dale Bumpers, should apprise grand jurors of their right to . . . be apprised of any exculpatory evidence.”).

113. *Id.* at 36.

114. Telephone Interview with Kevin Washburn, Dean, Univ. of N.M. Sch. of Law (Sept. 25, 2010).

Though judges frequently participate in the initial training of grand jurors in both state and federal court,¹¹⁵ the *Model Code of Judicial Conduct* is silent on the extent to which judges may serve as a sustained resource for grand jurors, ensuring that the grand juries understand the implications of their indictments in a post-9/11 context of plea bargaining.¹¹⁶ The absence of an unambiguously interpreted ethical rule, in conjunction with the *Williams* court's refusal to impose ethical obligations on prosecutors, may signal the need for judges to play a more active role in grand juror training.¹¹⁷

Indeed, judges' "direct involvement in the functioning of the grand jury" including the "constitutive" role of "calling grand jurors together and administering their oaths of office," would also be consistent with Justice Scalia's (controversial) historicized vision of a separate grand jury and "Judicial Branch" articulated in *Williams*.¹¹⁸ Legal scholar Niki Kuckes observes: "The long-standing federal judicial practice of instructing the grand jury—and through those instructions, shaping the procedures that the grand jury will follow—is hard to distinguish from the exercise of supervisory authority decried in *Williams*."¹¹⁹

The grand jury system would benefit from the incorporation of language in the *Model Code of Judicial Conduct* encouraging judges to meet with jurors periodically or revise their orientation materials to reflect the availability of exculpatory evidence in some instances, as well as the reality that the vast majority of defendants who face indictment will *not* automatically face trial. In the absence of independent counsel for grand juries in most jurisdictions, the judiciary appropriately assumes responsibility for jurors' comprehension of the model charges they receive and the significance of the oaths administered to

115. See Hoffmeister, *supra* note 2, at 1181 (noting that grand jurors' receipt of instructions by the judge is "one of the few times that grand jurors receive guidance from anyone other than the prosecutor"); Interview with Stevan Bunnell, Former Prosecutor in Wash., D.C. (Oct. 1, 2010) (noting the common practice by which the Chief Judge handled introductory and procedural matters at the start of grand jurors' service); Interview with Joseph Bowman, Assistant Bar Counsel, D.C. Office of the Bar Counsel, in Wash., D.C. (Sept. 21, 2010) (noting that the effect of empowering grand jurors with information about the reality of plea bargaining may be uncertain; while some jurors may approach deliberation more thoughtfully and thoroughly, others may conclude that plea bargaining may be a better indication of the guilt of prosecuted individuals who actually *have* committed the crimes for which they are charged).

116. ABA MODEL CODE OF JUDICIAL CONDUCT (2008).

117. See R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 21 GEO. J. LEGAL ETHICS 361, 366 (2000).

118. *United States v. Williams*, 504 U.S. 36, 47 ("Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office.").

119. See Kuckes, *supra* note 66, at 153 (citing *United States v. Navarro-Vargas*, 408 F.3d 1184, 1186, 1193 (9th Cir. 2005) (holding that delivering grand jury instructions does not violate the grand jury's independence)). The *Navarro-Vargas* Court divided grand jury history into four decisive periods: the "Early English Grand Jury" which served as a "Quasi-Prosecutor"; the "Colonial Grand Jury," which was "Quasi-Legislative" and "Quasi-Administrative"; the "Post-Revolutionary" "screening" grand jury; and finally, the "Modern Grand Jury." "Looking over this record," the court concluded, "we observe that the weight of U.S. history favors instructing the grand jury to follow the law without judging its wisdom."

them. As one legal scholar queried: “Without an understanding of its power, how can the grand jury really assert itself?”¹²⁰ Just as critics of plea bargaining argue a guilty plea “cannot be considered voluntary unless the defendant is aware of the relevant circumstances and likely consequences” of the plea,¹²¹ indictments gain legitimacy when grand jurors are equipped with knowledge of the discretion underlying their power to indict.

120. See, e.g., Ovio C. Lewis, *The Grand Jury: A Critical Evaluation*, 13 AKRON L. REV. 33, 34 (1979).

121. See Appleman, *supra* note 83, at 752.

